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No. 95-1498

Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1995

THOMAS W. HILL,
Plaintiff/ Petitioner,

v.

DEPARTMENT OF AIR FORCE, MERIT SYSTEMS PROTECTION BOARD, PAUL S. BRITT, and PAUL J. VALLERIE,
Defendants/ Respondents.

On Petition for Extraordinary Writ, and in the Alternative, Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

SUPPLEMENTAL BRIEF SEEKING REMAND FOR PROCEEDINGS CONSISTENT WITH SUPREME COURT OPINION IN *O'CONNOR v. CONSOLIDATED COIN CATERERS*

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BASIS FOR SUPPLEMENT

Pursuant to the provisions of Rule 15.8 of the Supreme Court Rules, Plaintiff/ Petitioner Thomas W. Hill hereby submits this supplement to his alternative petition for certiorari, calling attention to the case of *O'Connor v. Consolidated Coin Caterers, Inc.*, Supreme Court No. 95-354, decided on 1 April 1996. Petitioner shows the Court that the *O'Connor* decision, which was not available at the time of filing of the petition, has applicability to the circumstances underlying this action, and that the matter should be remanded to the District Court for proceedings consistent with the *O'Connor* opinion. Based upon discussion with Mr. Paul Bender of the Office of the Solicitor General, Defendants/ Respondents do not oppose this supplemental filing.

I. The Holdings of *O'Connor* Are Applicable To Facts Underlying This Petition.

In the O'Connor decision, the Court has stated,

> "[T]he question presented for our determination is what elements must be shown in an ADEA case to establish the prima facie case that triggers the employer's burden of production. ...
>
> "The discrimination prohibited by the ADEA is discrimination because of an individual's age, 29 U.S.C. 623(a)(1), though the prohibition is limited to individuals who are at least 40 years of age, 631(a). This language does not ban discrimination against employees because they are 40 or older; it bans discrimination against employees because of their age, but limits the protected class to those

> who are 40 or older. The fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out because of his age."

Facts of record in the District Court action show that Plaintiff's age was a motivating factor in the decisions of agency officials who (1) terminated his employment with the federal service and (2) rejected his attempt to obtain employment at the Air Force Space Division. Under the *O'Connor* standard, Respondents' defense of record that the younger employee who replaced Plaintiff was also age-protected is irrelevant to Plaintiff's prima facie showings.

1. As evidenced by declarations of John G. Gowan and Plaintiff (Stay Application No. A-447, Appendix pp. 11-14), the position which became vacant as a result of Hill's firing was used to promote a younger employee named Robert Blankert. When Hill first learned this fact, he sought admissions from Defendants on 21 July 1986 regarding Blankert's promotion, including admission of the statement that "Mr. Blankert is younger than plaintiff". Defendants responded,

> "**Denied**, in the sense of the Age Discrimination in Employment Act, as both Plaintiff and Mr. Blankert have been in the protected class for all times relevant to this suit. However, Mr. Blankert's birth date is protected under the Privacy Act, and cannot be released without a Court order."

Hill attached the response to a pleading (DNM Dkt. Nos. 302, 303) and moved the Court to deem admitted the fact that he had been "replaced by Mr Robert Blankert; a civil servant

considerably younger than the plaintiff". However, the Court entered its memorandum opinion, barring Hill's right to *de novo* review under holdings of *Hill v. Dept. of Air Force*, 796 F.2d 1469 (Fed. Cir. 1986), without acting on the motion. Whether Blankert was ten years younger than Hill (as Hill believed), or whether he was only seven years younger (and age-protected at the time of promotion) is irrelevant, as the facts affirmed by Hill and Gowan are sufficient for a prima facie showing.

2. Prior to the firing, Hill applied for a position advertised at Space Division in Los Angeles and was judged highly qualified by a rating committee. However, his name was arbitrarily removed from the list of eligibles. On 16 October 1986 Hill took the deposition of William Jacoby, the selecting official,[1] and asked with regard to the position (DNM Dkt. No. 435, 443),

> "Q. Do you recall discussing the fact that you were looking for less senior personnel?
>
> A. [Jacoby]. Not specifically, but, although, that is true."

In addition to barring Hill's discrimination claim on the basis of the Federal Circuit decision, the District Court treated the non selection at Space Division "as a 'prohibited personnel practice' under 5 U.S.C. § 2302 that was properly consolidated in [Hill's] appeal to the MSPB". Stay Application

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[1] Jacoby claimed during his deposition that the position was never filled. However, the promotion file for the position, which was released in response to a Court Order (DNM Dkt. No. 496), opposes that claim.

No. A-447, Appendix p. 21.[2] The term "less senior" implies a younger person and supports a prima facie showing of discrimination, without regard to the exact age differential.[3]

II. The Merit Of Hill's Age Discrimination Cause Has Never Been Addressed, And Remand Based On A Prima Facie Showing To Find Facts Which Have Been Misstated By The Courts Is What Justice Demands.

Hill's cause at the appellate level has been a victim of District Court failure to find certain facts of importance, as well as misstatements of facts of record by the appellate courts. The following recitations -- involving Hill's causes before (1) the Federal Circuit, (2) the Tenth Circuit, (3) the D.C. Circuit, and (4) the U.S. District Court -- serve to illustrate this circumstance.

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[2] The MSPB refused to consider the non selection. See MSPB order, dated 26 September 1985, *infra*,

> "The presiding official will not consider ... [Hill's] failure to be selected for positions ... "

[3] The District Court characterized Hill's complaint as pled on 27 January 1986. Subsequent discovery revealed facts of paramount importance to Hill's causes, which he could not possibly have known prior to discovery. Hill moved the Court on four occasions from November 1986 to April 1988 to include in the record discrimination findings of fact obtained from discovery, which continued until April 1988 (DNM Dkt. No. 496). Hill formally sought leave to amend the complaint on three occasions. The first request was denied on 21 September 1987, the second on 11 January 1993, and the third on 28 November 1994, including denial of Hill's FRCP 59 motion.

1. Federal Circuit Misstatement. In denying transfer of the MSPB record review to the District Court, the Federal Circuit held in *Hill v. Dept. of Air Force*, 796 F.2d 1469, 1470 (1986),

> "Dr. Hill was requested several times, by the agency and by the Board's presiding official, to state the basis for his claim of age discrimination. The record shows that Dr. Hill had several opportunities to respond, and to modify his answers ..." [footnote omitted]

The statement is simply not correct. The MSPB appeal[4] of the 5 July 1985 firing was docketed[5] by the MSPB on 16

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[4] In initiating the appeal, Hill entered the following information at ¶ 24 of MSPB Appeal Form 283,

> "Further, I have been subjected to unfair and discriminatory treatment. At the present time I do not have sufficient information to determine whether any of the causes listed, i.e., marital status, age, etc., are involved."

[5] The MSPB Regional Director entered the appeal filing order, appointing a presiding official and stating,

> "If the Board fails to adjudicate this appeal within 120 calendar days, the appellant is authorized to file a civil action in the appropriate U.S. District Court under ... section 15(c) of the Age Discrimination in Employment Act of 1967."

The MSPB did not adjudicate the appeal by 13 November 1985, which marked the expiration of a period of 120 days following the docketing of the appeal. See MSPB Decision DE 075 285 10204, which states,

> "This initial decision of the Merit Systems Protection Board will become a final decision and order of the Board

July 1985. The first order entered by the presiding official, dated 7 August 1985 before any discovery had been completed, states[6] [emphasis added],

> "DISCRIMINATION. ... The appellant is ordered to submit a more definite statement of the reasons why the appellant believes that discrimination and reprisal influenced the action ... **Appellant must file this response no later than August 16, 1985**."

Hill complied with a response filed on 16 August 1986, stating inter alia,[7]

> "Issues regarding the involvement of Dr Hill's age and physical condition will be clarified by further action involving the Directorate, and by further events relative to his health."

> on DEC 11 1985 unless a party files a petition for review with the Board on or before that date or the Board reopens the case on its own motion. ... A petition [for review by the Federal Circuit Court of Appeals] may not be filed while the case is pending before the Board."

On 29 November 1985 Hill filed an Amended Complaint in the District Court, alleging age discrimination.

[6] The entire MSPB record was filed with the District Court (DNM Dkt. No. 62), and was also included in the record on appeal (10 Cir. No. 95-2017, Dkt. No. 32).

[7] At the time of the firing Hill was under the care of a physician for a back injury.

However, on the same date that Hill moved to compel agency support of discovery, *i.e.*, 23 August 1985, the presiding official entered an order stating [emphasis added],

> "In his appeal, appellant also raised a general allegation of discrimination. ... I find that none of appellant's explanations present a non frivolous allegation of discrimination. Therefore, **I will not allow appellant to present evidence on these allegations**."

In response to Hill's motion to include review of age discrimination, the presiding official ordered on 26 September 1985,[8]

> "The presiding official will not consider the suspension of appellant's security clearance, his failure to be selected for positions, the merits of his past disciplinary record, his allegations of discrimination, or the merits of his protected activities ..."

It is therefore indisputable that Hill had a single opportunity[9] to support his age discrimination cause before the MSPB, that the window lasted from 7 to 16 August 1985, *i.e.*, a total of nine days (including mailing the MSPB order from Denver to Albuquerque), and that a claim of "several

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[8] The MSPB official's exclusion of consideration of the age discrimination cause violates the MSPB's own regulation as stated at 5 C.F.R. § 1201.151.

[9] It is also indisputable that neither the MSPB nor the agency ever informed Hill of his right to have the matter heard by the agency's EEO authority, nor of procedures for obtaining such review. The controlling regulation at 29 C.F.R. § 1613.403 requires that an appellant be so informed

opportunities" cannot be supported. Furthermore, the MSPB record did contain age discriminatory evidence which was rejected by the Federal Circuit, apparently because it did not fit into a prescribed mold.[10] At pages 694-5 of the MSPB transcript (Stay Application No. A-447, Appendix pp. 61-65), the agency's telephone control expert (William Giese) testified that no action was taken against a "young man" for the same type of telephone use for which Hill was fired, and further testified that he was not aware of a single instance of disciplinary action being taken against any individual other than Hill for such use.

2. Tenth Circuit Misstatement. In reversing the District Court preliminary injunction, the Tenth Circuit stated, *Hill v. Dept. of Air Force*, 844 F.2d 1047 (10th Cir. 1988),

> "Constitutional questions aside, however, courts do have the power to compel agencies to follow their own regulations. ... But the District Court made no finding that the Air Force violated any particular procedure ..."

Reference to District Court findings of fact compels a different conclusion (App. A - 5, A - 6),

> "17. On June 10, 1985, as a consequence of Colonel Britt's actions, the Air Force Security

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[10] See, H.R. Rep. No. 805, 90th Cong., 1st Sess., reprinted in 1967 U.S. Code Cong. & Ad. News, 2220,

> "The case-by-case basis should serve as the underlying rule in the administration of the legislation. Too many different types of situations in employment occur for the strict application of general [ADEA] prohibitions and provisions."

> Clearance Office (AFSCO) placed a 'pending adjudication' code by Plaintiff's name in its computer file and made that data available to all Department of Defense users, ... that as a consequence of Plaintiff's termination from federal service the AFSCO has refused to adjudicate the file ..."

> "26. Pursuant to the Personnel Security Program [AF Regulation 205-32], Defendants are required to adjudicate all special security files regardless of any other adverse action taken including separation. Defendants' Exhibit F, p. 60, para. 102(e)(2)."

The Tenth Circuit held that such violation would warrant remand to the agency directing compliance.[11] The Circuit Court then entered its own finding (*Hill*, 844 F.2d 1047),

> "Those facts [found by the MSPB] on their face value would make a remand regarding a top secret clearance a useless exercise."

The Defense Industrial Security Clearance Office (DISCO) viewed the matter in a different light, and upon completing the equivalent of a remand to AFSCO, did independently grant Hill a top secret security clearance, which he has held continuously since mid-1988. It seems fair to conclude that

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[11] The Tenth Circuit never afforded the District Court an opportunity to remand to the agency. The Circuit Court ordered that Hill's fourth cause be dismissed with prejudice, even though he specifically pled that the agency had not followed the provisions of AF Regulation 205-32 and demanded "mandamus action" (DNM Dkt. No. 28).

every review authority -- from Maj. Gen. Weiss to the U.S. District Court to the DISCO -- has regarded Britt's security suspension action against Hill as "unwarranted" and has also found "that the acts attributed to Plaintiff did not have adverse security significance" (App. A - 6).

3. D.C. Circuit Misstatement. The action now under review has roots in a 1984 D.C. District Court case (D.C. Civil No. 84-1952), wherein Hill accused the agency and Defendant Vallerie of maintaining an illegal system of records regarding Hill's conduct and job performance.

In May 1985 the D.C. District Court awarded summary judgment to the agency, holding that an involved extensive set of records were Vallerie's "personnel notes".[12] The agency served Hill with a notice of intent to remove him from federal service within one week following the Court's decision. Hill appealed the judgment and pled for equitable action to stay the reprisal. During oral argument before the D.C. Circuit, the Honorable Antonin Scalia referred to Hill's conduct in removing the records from Vallerie's desk following the latter's retirement as "breaking into" the desk. Although Hill strongly denied the charge during rebuttal argument, the Court stated in its *per curiam* opinion, *Hill v. U.S. Air Force*, 795 F.2d 1067 (D.C. Cir. 1986),

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[12] Summary judgment in favor of the agency was granted on the basis of affidavits executed by agency officials, although both Vallerie and Britt had denied under oath during the action that the involved records existed. Hill's opposing affidavit showed that Vallerie had circulated the records, had used them in his official capacity, and kept them filed under Hill's name and social security number. The fact that Vallerie had maintained the records without advertisement in the Federal Register was uncontested.

> "Shortly thereafter Vallerie retired from the Air Force. While his desk was vacant, Hill rifled through it and removed the Vallerie files concerning him. Appellant used these files to conduct depositions of several of his supervisors and later returned the files to the Air Force."

When Hill returned the records to the agency in 1984, he was given a reprimand for removing the files.[13] During the 1985 MSPB appeal, the presiding official refused to consider the propriety of the reprimand,[14] and agency officials have repeatedly used the reprimand and the Appellate Court statements to support their claims that Hill "stole" documents from the agency. However, the matter was reviewed by the District Court during the evidentiary hearing conducted on 13 and 16 June 1986. Upon hearing the testimonies of Britt,[15]

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[13] The reprimand was upheld following an agency grievance, even though the agency denied ownership of the records and even though though Vallerie had retired and had moved away by the time Hill retrieved them.

[14] See 26 September 1985 MSPB order, *supra*, holding that "The presiding official will not consider ... the merits of [Hill's] past disciplinary record ... "

[15] See Britt's testimony (16 June 1986 Hearing, Tr. Vol II, p. 148, 149; lodged on 17 October 1987).

> "The Court: Excuse me, did you say stolen documents?
>
> A [Britt]: I tend to use that as shorthand."
>
> ...
>
> "Q [Hill]: Do you know whether the Air Force ever charged me with theft?
>
> A [Britt]: They did not."

Hill, and other persons, and observing their conduct in court, the Court found (App. A - 2),

> "5. ... Colonel Britt ... accused Plaintiff of theft for Plaintiff's removal of personal notes **abandoned by a previous Directorate employee**."
> [Emphasis added.]

The Court also accepted the truth of testimony of Major John Gowan, Britt's deputy (*Id.*, A - 3),

> "7. ... that Plaintiff at all times acted professionally and made reasonable professional attempts to reconcile all differences; that Colonel Britt was unresponsive and negative in manner; that Colonel Britt was not objective and made numerous statements reflecting a vindictive attitude ..."

Throughout the appellate proceedings Hill has labored under a cloud of suspicion that his conduct has been improper and that his affidavits are not credible, while his antagonists have been presumed to be honorable persons acting in the best interest of the federal government. The fact-finding authority, *i.e.*, the District Court, has specifically found otherwise.

4. District Court Misstatement. The District Court has never reached the point of entering factual findings regarding adequacy of procedure followed by the parties prior to court action, nor regarding Hill's entitlement to estoppel or tolling. The Court acknowledged Hill's notice to the EEOC of intent to sue, but held (Stay Appl. No. A-447, Appendix pp. 20-21),

> "[I]t appears that Plaintiff failed to exhaust the administrative prerequisites in a timely manner, as required by 29 U.S.C. § 622g."

As pointed out in Hill's motions for reconsideration, there is no section 622g of the referenced Code, and the portion of the ADEA applicable to federal employees is found at 29 U.S.C. § 633a.

CONCLUSION

It is indisputable that Hill's age was a significant factor in two federal personnel actions which adversely affected him. In the first, responsible agency officials sought to replace him with a younger employee, and further, took no action against unprotected employees for the same conduct for which Hill's removal was effected. The MSPB, in concert with the Air Force, refused to allow Hill to discover or to present evidence of discrimination, as required by law and its own regulations, for the reason that Hill could not show that the agency had replaced him with a younger employee prior to the time that replacement occurred. The position of the two agencies is reminiscent to that of Tweedle-Dee and Tweedle-Dum, two characters in the Lewis Carroll novel, *Through the Looking Glass*. One raises a ruckus over a bleeding finger, and when Alice notes that she cannot see any blood, the other explains that his finger has not yet been pricked.

The Court of Appeals for the Federal Circuit accepted the agency argument, effectively usurping the District Court's jurisdiction. When the matter came before the Tenth Circuit upon appeal of an injunction, that Court deferred to the record review, prejudging the evidence which could be found

by the District Court and subsequently sanctioning denial of *de novo* review.

While age discrimination may not appear to be the sole motive[16] for the firing action, the law codified at 5 U.S.C. § 7702 does not limit review to those instances where age discrimination is the only basis, but rather affords *de novo* review when "a basis for the action was discrimination" (emphasis added). Furthermore, the denial of *de novo* review to Plaintiff has occurred despite the clearest of indications by Congress and holdings by the Supreme Court that the results of administrative hearing cannot be given preclusive effect in subsequent litigation.

The MSPB decision has also been used to bar Hill's right under the ADEA to review of agency rejection of his application for a position for which he was judged highly qualified in favor of a "less senior" candidate. Worse yet, the sphere of preclusion has been expanded to bar Hill's statutory right of review under the Privacy Act of agency actions in maintaining inaccurate and untimely records which the District Court found to be (App. A - 7) [emphasis added],

> "motivated solely by a deliberate intention to prevent Plaintiff from obtaining employment with civilian agencies who deal in the defense industry where security clearances are essential."

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[16] In argument before the Tenth Circuit the Defendants indicated a willingness to concede reprisal motives as bases for the firing, so long as they are not regarded as age-discriminatory treatment. The concession of violation of the provisions of 5 U.S.C. § 2302 is quite a turnaround from Air Force arguments before the MSPB and the Federal Circuit, and Plaintiff should be entitled at a minimum to estoppel of such claim.

The bars have been applied even though the MSPB presiding official ruled at the beginning of the administrative hearing that "I will not allow appellant to present evidence on [discrimination] allegations" and later reemphasized the ruling,

> "The presiding official will not consider the suspension of appellant's security clearance, his failure to be selected for positions, the merits of his past disciplinary record, his allegations of discrimination, or the merits of his protected activities ..."

Petitioner submits that corrective action by the Supreme Court is now appropriate.[17]

Respectfully submitted,

THOMAS W. HILL
Petitioner, Pro Se

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[17] Hill's right to corrective action seems to be in keeping with the D.C. Circuit Court opinion in *Hill v. U.S. Air Force*, 795 F.2d 1067 (D.C. Cir. 1986), which disallowed Hill's Privacy Act claim for damages because of failure to show willful agency conduct regarding the maintenance of "personal notes" then at issue, but also held,

> "We note that nothing in our disposition of this case prevents appellant from seeking to have his official records corrected."